

Kluwer Patent Blog

UK celebrates World IP Day by announcing UPCA ratification

Alan Johnson (Bristows) · Thursday, April 26th, 2018

At last the doubters have been proven wrong. The UK has ratified the UPC Agreement. The news was announced this afternoon by IP Minister, Sam Gyimah MP, at an IP Awareness Network event at the House of Commons Terrace to celebrate World IP Day, and we can expect to see this ratification recorded tomorrow on the EU Council's General Secretariat's record of notifications on its website [here](#).

Why the long wait?

It has to be admitted that it has been a marathon – completed more than five years after signature of the UPCA. At various stages, the UK's progress has been stalled by a series of unfortunate events. To understand why the delays have occurred, it is important to understand that the UK's constitution requires it to have passed all implementing legislation *before* it ratifies a Treaty such as the UPCA – unlike states such as France who can ratify first, and sort out the legislation afterwards.

Hence, although almost all of the work had been completed by the beginning of 2016 – indeed most of it two years earlier – one step remained before the UK could ratify. It had to implement the Privileges and Immunities Protocol. Unfortunately, there was a delay in this Protocol being agreed, such that it was only available for signature on 29 June 2016 which, by unfortunate coincidence was just after, not before, the Brexit vote. In other words, it was constitutionally impossible for the UK to ratify before then.



Of course, the Brexit vote itself caused a delay whilst the Government considered whether it could and should proceed with involvement in the UPC project. That was resolved at the end of November 2016, and the answer was an unequivocal, unconditional “yes”.

The UK then continued on the path toward ratification by signing the Protocol and prepared drafts of the legislation necessary to implement it, that is draft Statutory Instruments (SIs) – one for the UK as a whole and one for Scotland. As a result, the Preparatory Committee in January 2017 was able to announce a start date for the UPC of December that year.

In early 2017, therefore, it looked like both the UK and Germany would be ready to ratify by about May, and it was planned that immediately after Easter (late April), the final draft of the UK SI would be presented to the Westminster Parliament. Then came the next unfortunate event: the General Election. This was announced literally just a few days before the planned Parliamentary session. The election was famously called after the Prime Minister had gone for a walk in Wales with her husband, and surely not even the most paranoid conspiracy theorist could have thought that this conversation went along the lines of: “How can we derail the UPC? I know, let’s call a General Election”.

Inevitably, therefore, it was only the other side of the election that progress could resume. By this time, the news from Germany that Dr Stjerna had filed his constitutional complaint at the BVerfG had finally emerged, meaning that again there was no real rush for the UK to act. However, it still tried. In July it authorised the start of the Provisional Application Phase, and even tried to squeeze approval of the UK SI into the Westminster Parliament’s last business session before the summer break, but this had to be abandoned due to more urgent business arising on the final afternoon of the session. But on the other side of the long break, progress resumed. With still no news from the BVerfG, save that amicus briefs were to be filed which would slow matters down further, there was still no rush, but the legislation was passed in December, bringing the Parliamentary stage to an end.

But then there was another delay. Was this a further deliberate delaying tactic? Not at all. Formal approval of SIs has to be given by the Privy Council. It is chaired by Her Majesty the Queen. She is over 90 years old and had planned a long holiday in January. Hence the next meeting of the Privy Council was not until February.

After that, the UK was in a position to ratify, but there was a further short delay then too. Why? Again purely practical issues arose. There was a new IP minister, and more significantly, the Foreign Office (the Ministry to take the final ratification step) was just a little busy with “minor” issues such as the poisoning of a former KGB spy in a small English city in broad daylight, and the Syrian crisis – and all while there was still no news from Germany to make UPC ratification urgent.

Hence, as your author has been saying since November 2016, once the decision to go ahead with the UPC project had been taken, it was just a matter of completing the mechanics, and the theories of some deliberate dragging of feet were quite simply wrong. Some suggested a cunning plan was afoot to use the UPC as a negotiating tool in the EU withdrawal negotiations. This is something your author could never understand: the UK wanted to be in the UPC, and the other contracting states wanted the UK to be in the UPC, so how could this ever have been a negotiating card?

What next?

So we are now at the stage where the UK has done everything it needs to do. What does that mean for the future? Strictly speaking, on its own, nothing. We still await a few countries who, despite ratification have yet to approve the start of the Provisional Application Phase – Austria, Bulgaria,

Latvia, Lithuania, Malta and Portugal – of which two must do so before it can start (or for other countries who are yet to ratify to do so and approve the PAP). Plus, more significantly of course, there is Germany which remains a real remaining obstacle in the way of the UPC.

But vitally, serious discussions can now start about enabling the UK's continued participation in the UPC system after Brexit (including after the end of the transition period after 31 December 2020), and that is probably the point of greatest significance arising from today's announcement. Can agreement be reached on that? Can it extend to the unitary patent part of the package, which is clearly more difficult given its status as an EU right. Hopefully the answers to these questions will be "yes". There appears to be a will, and as the saying goes: where there is a will, there's a way.

Congratulations to the UK IPO and everyone else who has contributed to today's excellent news.

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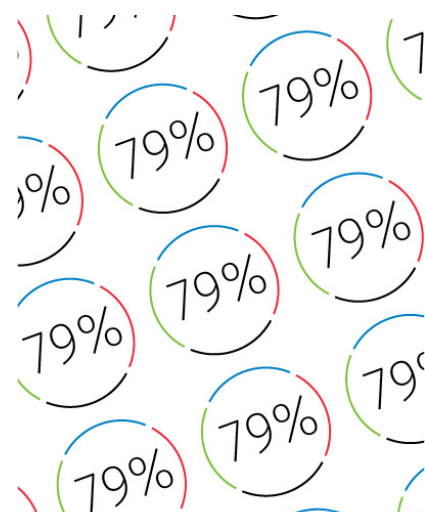
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